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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JACQUELINE DENISE FORREST,

Defendant and Appellant.

D067314

(Super. Ct. Nos. SDC241167,
SDC212094, SCE298614)

APPEALS from judgments of the Superior Court of San Diego County, Melinda J. Lasater, Judge. Affirmed in part and affirmed as modified in part.

Jill Kent, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal, Collette Cavalier and Elizabeth M. Carino, Deputy Attorneys General, for Plaintiff and Respondent.

Jacqueline Denise Forrest appeals from judgments of December 12, 2014, revoking probation and imposing sentence in three underlying matters. Forrest contends that the court erred in imposing a fee, two fines and two assessments in the December 2014 judgments in two of the cases. The Attorney General agrees. We have independently reviewed the record and agree and will strike the improper fee, fines and assessments.

As part of the grant of probation in one of the underlying matters, in April 2013 the trial court ordered Forrest to pay certain fees, fines and assessments, but stayed that portion of the judgment pending successful completion of probation. The People argue the sentence was unauthorized, asking that we lift the stay. For the fees, fines and assessments that were mandatory, we agree.

I.

STATEMENT OF THE CASE

A. *The Court Grants Forrest Probation in Three Underlying Matters*

At a sentencing hearing in January 2010, in San Diego Superior Court case No. SCD212094 (case 1), the court suspended imposition of sentence, granted Forrest probation and imposed the following fees, fines and assessments: (1) a fine of \$800, including surcharge and penalty assessment; (2) a court security fee of \$30 (Pen. Code, § 1465.8); (3) a criminal justice administrative booking fee of \$154 (Gov. Code, § 29550.1); (4) a criminal conviction assessment of \$30 (Gov. Code, § 70373); (5) a restitution fine of \$200 (Pen. Code, § 1202.4, subd. (b)); and (6) a probation revocation restitution fine of \$200 (Pen. Code, § 1202.44), suspended unless probation is revoked.

At a sentencing hearing in July 2010, in San Diego Superior Court case No. SCE298614 (case 2), the court suspended imposition of sentence, granted Forrest probation and imposed the following fees, fines and assessments: (1) a fine of \$4,000, including surcharge and penalty assessment; (2) a drug program fee of \$570 (Health & Saf. Code, § 11372.7); (3) a lab analysis a fee of \$190 (Health & Saf. Code, § 11372.5); (4) a fine of \$266, including penalty assessment (Pen. Code, § 1463.23); (5) a court security fee of \$30 (Pen. Code, § 1465.8); (6) a criminal justice administrative booking fee of \$154 (Gov. Code, § 29550.1); (7) a criminal conviction assessment of \$30 (Gov. Code, § 70373); (8) a restitution fine of \$200 (Pen. Code, § 1202.4, subd. (b)); and (9) a probation revocation restitution fine of \$200 (Pen. Code, § 1202.44), suspended unless probation is revoked.

At a sentencing hearing in April 2013, in San Diego Superior Court case No. SDC241167 (case 3), the court suspended imposition of sentence, granted Forrest probation and imposed the following fees, fines and assessments: (1) a fine of \$800, including surcharge and penalty assessment; (2) a drug program fee of \$570 (Health & Saf. Code, § 11372.7); (3) a lab analysis a fee of \$190 (Health & Saf. Code, § 11372.5); (4) a court operations assessment of \$40 (Pen. Code, § 1465.8); (5) a criminal justice administrative booking fee of \$154 (Gov. Code, § 29550.1); (6) a criminal conviction assessment of \$30 (Gov. Code, § 70373); (7) a restitution fine of \$240 (Pen. Code, § 1202.4, subd. (b)); and (8) a probation revocation restitution fine of \$240 (Pen. Code, § 1202.44), suspended unless probation is revoked. The court stayed these fees, fines and assessments "pending successful completion of probation."

B. *The Court Revokes Probation in All Three Cases*

On June 2, 2014, the court revoked probation in all three cases, and on December 12, 2014, the court sentenced Forrest.¹

In case 2, the court sentenced Forrest to credit for time served and terminated the case.

In case 1, the court sentenced Forrest to a determinate term of two years (to be served concurrently with the sentence in case 3) and imposed the following fees, fines and assessments: (1) a court operations assessment of \$40 (Pen. Code, § 1465.8); (2) a criminal justice administrative fee of \$154 (Gov. Code, § 29550 et seq.); (3) a criminal conviction assessment of \$30 (Gov. Code, § 70373); (4) a restitution fine of \$400 (Pen. Code, § 1202.4, subd. (b)), plus a 10 percent administrative fee (Pen. Code, § 1202.4, subd. (l)); and (5) a parole revocation restitution fine of \$400 (Pen. Code, § 1202.44), suspended unless parole is revoked.

In case 3, the court sentenced Forrest to a determinate term of two years (to be served concurrently with the sentence in case 1) and imposed the following fees, fines and assessments: (1) a court operations assessment of \$40 (Pen. Code, § 1465.8); (2) a criminal justice administrative fee of \$154 (Gov. Code, § 29550 et seq.); (3) a criminal conviction assessment of \$30 (Gov. Code, § 70373); (4) a restitution fine of \$400 (Pen.

¹ By minute orders filed in March 2015, the court amended the sentences in cases 1 and 3, nunc pro tunc to December 12, 2014, the original sentencing date. By minute orders filed in July 2015, the court amended the credits in the sentences in all three cases, nunc pro tunc to March 18, 2015. None of these amendments affects any issue or argument on appeal.

Code, § 1202.4, subd. (b)), plus a 10 percent administrative fee (Pen. Code, § 1202.4, subd. (l)); and (5) a parole revocation restitution fine of \$400 (Pen. Code, § 1202.44), suspended unless parole is revoked.

Forrest timely appealed from the judgments in cases 1, 2 and 3.

II.

DISCUSSION

A. *Forrest's Argument as to Certain Fees, Fines and Assessments in the December 2014 Judgments in Cases 1 and 3*²

In case 1, the court ordered payment of the same fees, fines and assessments in *both* January 2010 (grant of probation) *and* in December 2014 (sentence following revocation of probation).³ In case 3, the court ordered payment of the same fees, fines and assessments in *both* April 2013 (grant of probation) *and* in December 2014 (sentence following revocation of probation).⁴

² On appeal, Forrest raises no issue or argument with regard to case 2.

³ In case 1, in both January 2010 and December 2014, the court ordered Forrest to pay: (1) a court operations assessment (Pen. Code, § 1465.8); (2) a criminal justice administrative booking fee (Gov. Code, § 29550.1); (3) a criminal conviction assessment (Gov. Code, § 70373); (4) a restitution fine (Pen. Code, § 1202.4, subd. (b)); and (5) a probation revocation restitution fine (Pen. Code, § 1202.44).

⁴ In case 3, in both April 2013 and December 2014, the court ordered Forrest to pay: (1) a court operations assessment (Pen. Code, § 1465.8); (2) a criminal justice administrative booking fee (Gov. Code, § 29550.1); (3) a criminal conviction assessment (Gov. Code, § 70373); (4) a restitution fine (Pen. Code, § 1202.4, subd. (b)); and (5) a probation (2013)/parole (2014) revocation restitution fine (Pen. Code, §§ 1202.44, 1202.45).

With regard to these two cases, Forrest argues that the fees, fines and assessments ordered in December 2014 are unauthorized and should be stricken. More specifically, Forrest argues that, because the *initial* imposition of fees, fines and assessments survived the *later* revocation of probation in December 2014, that portion of the December 2014 judgment imposing the *same* fees, fines and assessments was unauthorized and should be stricken.

The Attorney General agrees that the December 2014 judgments in cases 1 and 3 contain fees, fines and assessments that are duplicative of those ordered in January 2010 and April 2013, respectively; that the duplicative awards are unauthorized; and that the December 2014 duplicative awards should be stricken.

Our independent review of the record confirms the duplicity in the December 2014 judgments in cases 1 and 3 asserted by Forrest and acknowledged by the Attorney General.

An appellate court can correct an illegal or unauthorized sentence at any time. (*People v. Sanders* (2012) 55 Cal.4th 731, 743, fn. 13 (*Sanders*).) Accordingly, the following fees, fines and assessments are stricken from the December 12, 2014 judgment in case 1: (1) a court operations assessment of \$40 (Pen. Code, § 1465.8); (2) a criminal justice administrative fee of \$154 (Gov. Code, § 29550 et seq.); (3) a criminal conviction assessment of \$30 (Gov. Code, § 70373); (4) a restitution fine of \$400 (Pen. Code, § 1202.4, subd. (b)), plus a 10 percent administrative fee (Pen. Code, § 1202.4, subd. (l)); and (5) a parole revocation restitution fine of \$400 (Pen. Code, § 1202.44), suspended unless parole is revoked. Likewise, the following fees, fines and assessments are stricken

from the December 12, 2014 judgment in case 3: (1) a court operations assessment of \$40 (Pen. Code, § 1465.8); (2) a criminal justice administrative fee of \$154 (Gov. Code, § 29550 et seq.); (3) a criminal conviction assessment of \$30 (Gov. Code, § 70373); (4) a restitution fine of \$400 (Pen. Code, § 1202.4, subd. (b)), plus a 10 percent administrative fee (Pen. Code, § 1202.4, subd. (l)); and (5) a parole revocation restitution fine of \$400 (Pen. Code, § 1202.44), suspended unless parole is revoked.

B. *The Stay of the Fees, Fines and Assessments in the April 2013 Judgment in Case 3*

In the respondent's brief, the Attorney General asks that in case 3 we remand the April 2013 judgment in case 3 with directions to the trial court to lift the stay on the fees, fines and assessments. The Attorney General cites general authority to the effect that a sentence unauthorized by law is subject to judicial correction whenever the error comes to the attention of the court. Given our responsibility to ensure an authorized sentence whenever a potential error has been brought to our attention (see *People v. Smith* (2001) 24 Cal.4th 849, 852 [unauthorized sentence is "reviewable 'regardless of whether an objection or argument was raised in the trial and/or reviewing court' "]; *Sanders, supra*, 55 Cal.4th at p. 743, fn. 13 [unauthorized sentence can be corrected by appellate court "at any time"]), we have undertaken the effort to determine which of the fees, fines and assessments that were stayed in case 3 might be unauthorized. As applicable here, therefore, where a trial court imposes but stays fees, fines or assessments mandated by law, the sentence is illegal, and thus unauthorized and must be set aside. (*People v. Woods* (2010) 191 Cal.App.4th 269, 272-273 (*Woods*) [set aside stay of operations assessment, court security fee and restitution fine], quoting from *People v. Cattaneo*

(1990) 217 Cal.App.3d 1577, 1589 (*Cattaneo*) [set aside stay of five-year drug enhancement].)

Once again, in case 3, in April 2013 the court imposed — but stayed pending successful completion of probation — the following fees, fines and assessments: (1) a fine of \$800, including surcharge and penalty assessment; (2) a drug program fee of \$570 (Health & Saf. Code, § 11372.7); (3) a lab analysis a fee of \$190 (Health & Saf. Code, § 11372.5); (4) a court operations assessment of \$40 (Pen. Code, § 1465.8); (5) a criminal justice administrative booking fee of \$154 (Gov. Code, § 29550.1); (6) a criminal conviction assessment of \$30 (Gov. Code, § 70373); (7) a restitution fine of \$240 (Pen. Code, § 1202.4, subd. (b)); and (8) a probation revocation restitution fine of \$240 (Pen. Code, § 1202.44), suspended unless probation is revoked. We will discuss each.

With regard to the court operations assessment of \$40 (Pen. Code, § 1465.8) and the criminal conviction assessment of \$30 (Gov. Code, § 70373), each is mandatory, and "[t]here is no statutory authority which allows [either] to be *stayed*." (*Woods, supra*, 191 Cal.App.4th at p. 272.) Thus, the stay in effect here is illegal, results in an unauthorized sentence, and must be set aside. (*Id.* at pp. 271-273.)

The drug program fee of \$570 (Health & Saf. Code, § 11372.7), the lab analysis fee of \$190 (Health & Saf. Code, § 11372.5) and the criminal justice administrative booking fee of \$154 (Gov. Code, § 29550.1) are each mandatory. With regard to the drug program fee, "each person who is convicted of a violation of this chapter *shall* pay a drug program fee in an amount" (Health & Saf. Code, § 11372.7, subd. (a), italics added.) With regard to the lab analysis fee, a defendant like Forrest who violates Health

and Safety Code section 11375, subdivision (b) "*shall* pay a criminal laboratory analysis fee in the amount of" (Health & Saf. Code, § 11372.5, subd. (a); italics added.)

With regard to the criminal justice administrative fee, Government Code section 29550, subdivision (c) allows a county to recover from an arrestee like Forrest a criminal justice administration fee, and subdivision (d)(2) directs that "[t]he court *shall*, as a condition of probation, order the convicted person . . . to reimburse the county for the criminal justice administration fee" (Italics added.) Once again, we learn from *Woods* and *Cattaneo* that, where a trial court stays imposition of a fee mandated by law, the sentence is illegal, and thus unauthorized, and must be set aside when brought to our attention. (*Woods*, *supra*, 191 Cal.App.4th at pp. 272-273; *Cattaneo*, *supra*, 217 Cal.App.3d at p. 1589.) As applicable here, therefore, absent other arguments, because the court-ordered stay of these *mandatory* fees is illegal, the sentence is unauthorized, and the stay must be set aside as to these fees. (*Woods*, at pp. 272-273; *Cattaneo*, at p. 1589.)

With regard to the drug program fee of \$570 (Health & Saf. Code, § 11372.7) discussed in the preceding paragraph, Forrest argues that it is discretionary — based on the requirement that the court *first* determine whether the defendant has the ability to pay the fee and *then* "set the amount to be paid . . . in a manner the court believes is reasonable and compatible with the person's financial ability." (*Id.*, § 11372.7, subd. (b).) We disagree; the fee is mandatory, and the only basis on which the court may decline to order the fee (or set an amount less than provided in the statute) is upon a factual finding of what "the court believes is reasonable and compatible with the person's financial ability." (*Ibid.*) We decline to consider Forrest's argument regarding her ability to pay —

including her request that we remand the matter for resentencing — because she did not preserve this objection for appeal. To preserve a challenge to a fee based on ability to pay, a defendant must object in the trial court, and failure to raise the issue in the first instance forfeits the right to contest it on appeal. (*People v. McCullough* (2013) 56 Cal.4th 589, 597 (*McCullough*) [booking fee]; *People v. Martinez* (1998) 65 Cal.App.4th 1511, 1517 (*Martinez*) [drug program fee].)⁵

With regard to the restitution fine of \$240 (Pen. Code, § 1202.4, subd. (b)) and the related probation revocation restitution fine of \$240 (*id.*, § 1202.44), we begin with the understanding that, due to the *mandatory* language in Penal Code section 1202.4, subdivision (b)(1) — "In every case where a person is convicted of a crime, the court *shall* impose a separate and additional restitution fine . . ." (*ibid.*, italics added) — the stay of a restitution order under this statute is an unlawful sentence. (*Woods, supra*, 191 Cal.App.4th at p. 273.) We are aware that the trial court is not required to impose the restitution fine if the court "finds compelling and extraordinary reasons for not doing so and states those reasons on the record." (Pen. Code, § 1202.4, subd. (b)(1); see *Woods*, at p. 273.) Here, however, the court did not state on the record any such findings; nor is there any indication that the court intended to act under this exception to the otherwise mandatory language in the statute. (*Woods*, at p. 273.) Instead, the court stayed a

⁵ The criminal justice administrative booking fee (Gov. Code, § 29550.1) discussed in the text in the preceding paragraph is also "based on [the convicted person's] ability to pay" (*id.*, § 29550, subd. (d)(2)). Even though Forrest did not mention this requirement in her appeal, her failure to challenge the fee at the time of sentencing on this basis forfeited any right she may have had to contest the fee at a later date. (*McCullough, supra*, 56 Cal.4th at p. 597; *Martinez, supra*, 65 Cal.App.4th at p. 1517.)

mandatory fine, which resulted in an illegal and thus unauthorized sentence. (*Ibid.*)

Thus, we will set aside the stay.

Finally, with regard to the \$800 fine, the record does not state the basis on which the court imposed the fine.⁶ The court sentenced Forrest based on her violation of Health and Safety Code section 11375, subdivision (b)(1), which does not provide for a fine.⁷ Penal Code section 672 provides for a *discretionary* fine where, as here, a defendant is convicted of a felony that is punishable by imprisonment without mention of a fine.⁸ Thus, if the fine at issue here was imposed under Penal Code section 672, then it was discretionary, and we are unaware of any authority that deems the stay of a *discretionary* fine to be illegal or to result in an unauthorized sentence. Alternatively, if the fine was imposed under any other authority, neither the record nor the Attorney General identifies such authority. Because there has not been an adequate showing of an unauthorized sentence that resulted from the stay of this fine, we deny the Attorney General's request to lift the stay as to this fine.

⁶ According to the probation report, the base fine is \$200, the penalty assessment is \$560 and the surcharge is \$40 — for a total of \$800.

⁷ "Every person who possesses for sale, or who sells, any substance specified in subdivision (c) shall be punished by imprisonment in the county jail for a period of not more than one year or state prison." (Health & Saf. Code, § 11375, subd. (b)(1).)

⁸ "Upon a conviction for any crime punishable by imprisonment in any jail or prison, in relation to which no fine is herein prescribed, the court *may* impose a fine on the offender not exceeding . . . ten thousand dollars (\$10,000) in cases of felonies, in addition to the imprisonment prescribed." (Pen. Code, § 672, italics added.) Thus, a section 672 fine is permitted "so long as no base fine for th[e] offense is otherwise 'prescribed.'" (*People v. Uffelman* (2015) 240 Cal.App.4th 195, 201.)

DISPOSITION

In San Diego Superior Court case No. SCD241167, the stay of the following fees, fines and assessments in the April 8, 2013 judgment is stricken: (1) the drug program fee of \$570 (Health & Saf. Code, § 11372.7); (2) the lab analysis a fee of \$190 (Health & Saf. Code, § 11372.5); (3) the court operations assessment of \$40 (Pen. Code, § 1465.8); (4) the criminal justice administrative booking fee of \$154 (Gov. Code, § 29550.1); (5) the criminal conviction assessment of \$30 (Gov. Code, § 70373); (6) the restitution fine of \$240 (Pen. Code, § 1202.4, subd. (b)); and (7) the probation revocation restitution fine of \$240 (Pen. Code, § 1202.44).

In San Diego Superior Court case No. SCE298614, the December 12, 2014 judgment is affirmed.

In San Diego Superior Court case No. SCD 212094, the following fees, fines and assessments are stricken from the December 12, 2014 judgment: (1) the court operations assessment of \$40 (Pen. Code, § 1465.8); (2) the criminal justice administrative fee of \$154 (Gov. Code, § 29550 et seq.); (3) the criminal conviction assessment of \$30 (Gov. Code, § 70373); (4) the restitution fine of \$400 (Pen. Code, § 1202.4, subd. (b)), plus a 10 percent administrative fee (*id.*, § 1202.4, subd. (l)); and (5) the parole revocation restitution fine of \$400 (*id.*, § 1202.44). The superior court is ordered (1) to modify the abstract of judgment to reflect these rulings and (2) to forward a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

In San Diego Superior Court case No. SCD 241167, the following fees, fines and assessments are stricken from the December 12, 2014 judgment: (1) the court operations assessment of \$40 (Pen. Code, § 1465.8); (2) the criminal justice administrative fee of \$154 (Gov. Code, § 29550 et seq.); (3) the criminal conviction assessment of \$30 (Gov. Code, § 70373); (4) the restitution fine of \$400 (Pen. Code, § 1202.4, subd. (b)), plus a 10 percent administrative fee (*id.*, § 1202.4, subd. (l)); and (5) the parole revocation restitution fine of \$400 (*id.*, § 1202.44). The superior court is ordered (1) to modify the abstract of judgment to reflect these rulings and (2) to forward a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

IRION, J.

WE CONCUR:

NARES, Acting P.J.

PRAGER, J.*

* Judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.